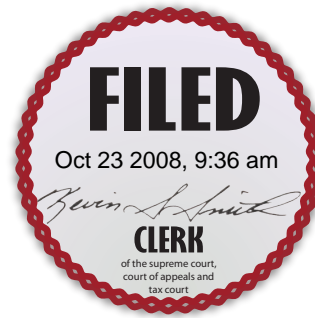


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF THE ADOPTION OF:
D.J.E. and M.N.E.

Brittany Espinoza,

Appellant-Respondent,

vs.

David Speer and Mary Speer,

Appellees-Petitioners.

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No. 36A05-0805-CV-272

APPEAL FROM THE JACKSON CIRCUIT COURT
The Honorable William E. Vance, Judge
Cause No. 36C01-0705-AD-5

October 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-respondent Brittany Espinoza appeals the trial court's order granting a Decree of Adoption of her twin daughters to David and Mary Speer.¹ Specifically, Espinoza alleges that the trial court erred in finding that her consent to the adoption was unnecessary under Indiana Code section 31-19-9-8 because she had abandoned the twins and had failed to support them. Finding no error, we affirm the judgment of the trial court.

FACTS

Espinoza is the biological mother of twin girls, D.J.E and M.N.E., born on September 13, 2005. On November 10, 2005, less than eight weeks after giving birth, Espinoza agreed that the twins should live with Rexanne and Jim Ude (the Udes), who are long-time friends of Espinoza. Espinoza had been experiencing difficulty caring for the twins and had left the twins in their car seats for long periods of time, resulting in the twins having developmental problems with their neck muscles. In addition, Child Protective Services had been called to Espinoza's home on at least one occasion when she had left one of the twins alone.

With Espinoza's consent, the Udes became the twins' legal guardians on November 28, 2005. The Udes knew David and Mary Speer (the Speers) very well and because the Udes worked outside the home, they arranged for Mary to provide child care for the twins.

After assuming custody, the Udes gave Espinoza the opportunity to care for the twins without supervision in their home; however, Espinoza's attempt to care for the

¹ The twins' father, Jose Espinoza, has previously terminated his parental rights.

twins was unsuccessful. Mary came to the Udes' home twice while the twins were under Espinoza's care. On the first occasion, Mary found Espinoza lying on the couch watching television while the twins were crying in their beds. On the second occasion, Mary stopped by around 5:30 p.m. and found the twins still in their pajamas and screaming in their beds.

Initially, Espinoza visited her twins on a weekly basis, but the frequency of her visits decreased over time. Sometimes, a month would pass before Espinoza would see the twins. When Espinoza did show up for visits, she would do so at times that disrupted the twins' routines, such as in the middle of the night or while they were napping.

The Udes realized that Espinoza would continue to disrupt the twins' lives because she knew where they lived and how to contact them. To avoid this, the Speers offered to assume the guardianship and Espinoza consented.

The Speers became the twins' legal guardians on August 23, 2006. Shortly thereafter, Espinoza moved two counties away to live with her boyfriend, Cecilio Primo. Espinoza and Primo lived in a mobile home that, at times, had no heat, gas, or running water. In addition, the residence had a hole in the floor and the ceiling was caving in and leaking.

Espinoza and Primo had a son on August 6, 2007. Other than food stamps and Primo's work income, Espinoza had no means to support herself and sometimes Primo was unable to provide food for them. Espinoza had a job for a month at one point but was fired. Espinoza also worked for Vector Marketing, but told Mary that she quit.

Espinoza did not financially support the twins while they were under the Speers' care, and she did not send the twins a birthday gift in 2006.

From August 2006, when the Speers became the twins' guardians, until December 2006, Espinoza saw the twins only six times. Mary tried to work around Espinoza's schedule to find convenient times for visitation and only had to cancel a scheduled visitation on one occasion. During one of the scheduled visits, Espinoza was arrested on a warrant for shoplifting, and she spent the next two days in jail.

In October 2006, Mary learned that Espinoza was going to try to remove the twins from her care. From that point on, Mary felt that it was unsafe for Espinoza to visit the twins unless she was present. After December 2006, Espinoza had almost no contact with the twins until May 14, 2007, when she requested to take the twins to her grandmother's funeral. Because Mary did not think it was appropriate to have the twins visit Espinoza at the funeral home, she arranged for Espinoza to see the twins at a park.

The Speers filed a petition to adopt the twins on May 25, 2007. After the petition was filed, Espinoza began to call the Speers more frequently and sent the twins a birthday gift in 2007. During their telephone conversations, Espinoza sometimes asked about the twins, but mostly talked about her pregnancy and Primo's abusive nature and unwillingness to give her money. After the adoption petition was filed, Espinoza requested visitation with the twins on five occasions. Mary denied all requests; however, Espinoza did not file a motion to establish parenting time until November 15, 2007, which was nearly six months after the adoption petition was filed.

Since the birth of the twins, Espinoza has lived in eighteen different places with five different men and associated with people who were known to be involved in drugs. Rexanne Ude testified that Espinoza admitted to using cocaine and marijuana and freezing a friend's urine to avoid a positive drug test. As of December, 2007, Espinoza never held a consistent job and made money by transporting illegal aliens from the west to the Midwest and shoplifting. Although Espinoza attempted to obtain her GED, she quit the program. Espinoza has admitted that Primo is an illegal alien and that if he were sent back to Mexico, she would "go with him." Appellant's App. p. 70.

The Speers have been involved with caring for the twins since they were two months old. Mary works from home and is there all day with the children. When a home study was conducted on July 18, 2007, by the Jackson County Department of Child Services, the family case manager observed that the Speers "dearly loved" the twins and that the four of them were "already a family." Id. at 84-85. Espinoza admitted that the Speers have cared for the twins "very, very well." Id. at 74.

On December 19, 2007, finding that Espinoza's consent to adopt was not required under Indiana Code section 31-19-9-8, the trial court granted the Speers' petition to adopt the twins. Espinoza now appeals.

DISCUSSION AND DECISION

I. Standard of Review

When reviewing a trial court's ruling in an adoption proceeding, "we will not disturb that ruling unless the evidence leads to but one conclusion and the trial court reached an opposite conclusion." In re Adoption of M.A.S., 815 N.E.2d 216, 218 (Ind.

Ct. App. 2004). We will neither reweigh the evidence nor assess the credibility of witnesses, but will examine the evidence most favorable to the trial court's decision together with reasonable inferences drawn therefrom to determine whether sufficient evidence exists to sustain the decision. Id. at 218-19.

Indiana Code section 31-19-9-8 provides in relevant part:

(a) Consent to adoption, which may be required under section 1 of this chapter, is not required from any of the following:

(1) A parent or parents if the child is adjudged to have been abandoned or deserted for at least six (6) months immediately preceding the date of the filing of the petition for adoption.

(2) A parent of a child in the custody of another person if for a period of at least one (1) year the parent:

(A) fails without justifiable cause to communicate significantly with the child when able to do so; or

(B) knowingly fails to provide for the care and support of the child when able to do so as required by law or judicial decree.

Espinoza argues that the Speers must satisfy the requirements of this statute by “clear, cogent, and indubitable evidence.” Appellant’s Br. p. 10. However, in M.A.S., this court rejected that standard, concluding that it is inconsistent with Indiana Code sections 31-19-9-8(a)(11), which provides that a parent must be proved unfit by clear and convincing evidence, and 31-37-14-2, which provides that the termination of parental rights must be based upon clear and convincing evidence. 815 N.E.2d at 220. This court reasoned that the legislature could not have intended two different standards of proof to govern different parts of the same and closely related statutes. Id. Therefore, the Speers were

required to show by clear and convincing evidence that Espinoza's consent to the adoption was unnecessary.

II. Abandonment and Failure to Support

Espinoza argues that the trial court erred in concluding that her consent to the adoption was unnecessary because she had abandoned the twins. Abandonment is "any conduct by the parent which evinces an intent or settled purpose to forgo all parental duties and to relinquish all parental claims to the child." In re Adoption of Childers, 441 N.E.2d 976, 979 (Ind. Ct. App. 1982). In addition, "[i]f a parent has made only token efforts to support or to communicate with the child the court may declare the child abandoned by the parent." I.C. § 31-19-9-8(b).

Here, the trial court concluded that "[p]etitioners have proven by clear and convincing evidence that the Respondent is unfit to be a parent and has abandoned the girls." Appellant's App. p. d. The trial court found that Espinoza had seen the twins only seven times since they had been with the Speers and only once between December 2006 and May 2007. Id.

The record shows that the twins have not been in Espinoza's care since they were eight weeks old. Id. at 9-10, 27, 65-66. While the Udes were the twins' guardians, Espinoza would sometimes go a month without seeing them. Id. at 20. After the Speers became guardians, Espinoza moved two counties away to be with her boyfriend. Furthermore, Mary testified that Espinoza only saw the twins six times between August 2006 and December 2007 and only once from December 2007 to May 2007. Id. at 29.

Moreover, according to Mary's testimony, Espinoza's telephone calls were infrequent until the Speers filed the petition for adoption. Id. at 30.

Espinoza asserts that the Speers prevented her from visiting her twins, and she points to the Speers' refusal to allow the twins to go to her grandmother's funeral and the concealment of where they lived. Given the evidence in favor of the trial court's judgment, however, we cannot say that the trial court could not find by clear and convincing evidence that Espinoza abandoned her twins and that any contact Espinoza had with her twins was "only token efforts." See I.C. § 31-19-9-8(b). In essence, Espinoza is simply asking this court to reweigh the evidence, which we will not do. Thus, the trial court did not err in finding that Espinoza had abandoned her twins.

In a related argument, Espinoza maintains that the trial court erred in finding that she has failed to support her twins because she was not legally required to support them. Initially, we note that Indiana Code section 31-19-9-8(a) does not require that a trial court find both abandonment and failure to support. Rather, the statute sets forth multiple circumstances under which parental consent to an adoption is unnecessary, and abandonment and failure to support are only two of them. Id. Thus, having concluded that the trial court did not err in finding that Espinoza abandoned her twins, her argument that she was not legally required to support her twins is irrelevant.

Finally, even assuming solely for argument's sake that the finding of abandonment was erroneous, Espinoza's assertion that she was not required to support her twins by law or judicial decree is unavailing. Indeed, Indiana imposes upon every parent a duty to support his or her children, which exists apart from any court order or statute. M.A.S.,

815 N.E.2d at 220. Moreover, Indiana Code section 31-19-9-8(a)(2)(B) provides in part that “[c]onsent to adoption . . . is not required [when] a parent . . . knowingly fails to provide for the care and support [of his or her children] when able to do so.”

Here, Espinoza admitted that she never provided financial support for her twins while they were under the Speers’ care. Appellant’s App. p. 60-61. Furthermore, Espinoza admitted that she had been employed for a month at one point while the twins were with the Speers. Thus, the trial court could find by clear and convincing evidence that Espinoza knowingly failed to support her twins when she had the ability to do so.

The judgment of the trial court is affirmed.

MATHIAS, J., and BROWN, J., concur.